name ſhould be taken from the roll of attornies, and placed on the liſt of counſellors. 1793.

THE COURT directed the transfer to be made; and Mr. *Hallowell* was qualified, *de novo*, as counſellor.

FOWLER *et al. vs.* LINDSEY, *et al.*

FOWLER *et al. vs.* MILLER.

A RULE had been originally obtained in theſe actions (which were depending in the Circuit Court for the Diſtrict of *Connecticut*) at the inſtance of the Defendants, requiring the Plaintiff to ſhew cauſe, why a *Venire* ſhould not be awarded to ſummon a Jury from ſome Diſtrict, other than that of *Connecticut* or *New-York*; but it was changed, by conſent, into a rule to ſhew cauſe why the actions ſhould not be removed by *Certiorari* into the Supreme Court, as excluſively belonging to that juriſdiction. On ſhewing cauſe, it appeared, that ſuits, in the nature of Ejectments, had been inſtituted in the Circuit Court for the Diſtrict of *Connecticut*, to recover a tract of land, being part of the *Connecticut Gore* which that ſtate had granted to *Andrew Ward* and *Jeremiah Haſley*, and by whom it had been conveyed to the Plaintiffs. The Defendants pleaded that they were inhabitants of the State of *New-York*; that the premiſes, for which the ſuits were brought, lay in the County of *Steuben*, in the ſtate of *New-York*; and that the Circuit Court for the Diſtrict of *New-York*, or the Courts of the State, and no other Court, could take cognizance of the actions. The Plaintiffs replied, that the premiſes lay in the State of *Connecticut*; and, iſſue being joined, a *venire* was awarded. On the return, however, the Defendants challenged the array, becauſe the Marſhall of the Diſtrict of *Connecticut*, a reſident and citizen of that State, had arrayed the Jury by his deputy, who was, alſo, a citizen of *Connecticut*, and intereſted as a purchaſer, or claimant, in the *Connecticut Gore*, under the ſame title as the Plaintiffs. The Plaintiffs prayed oyer of the record and return, averred that the deputy Marſhall was not intereſted in the queſtion in iſſue, and demurred to the challenge for being double, and contrary to the record, which does not ſhew that the Jury was returned by the deputy Marſhall. The Defendants joined in demurrer. *The Court* over-ruled the challenge, as it reſpected the general intereſt of the Marſhall and his deputy, owing to their being citizens of *Connecticut*; but allowed it, and quaſhed the array, on account of the particular

1799. ticular intereſt of the deputy, he being intereſted in the ſame tract of land, under colour of the ſame title as the Plaintiffs.

The amended rule was argued, by *Lewis* and *Hoffman* (the Attorney-General of *New-York*,) in favor of its being made abſolute, and by *Lillhouſe* of *Connecticut* againſt it, on the queſtion, whether the ſuits ought to be conſidered as virtually depending between the States of *Connecticut* and *New-York*? And the following opinions were delivered by the Court, THE CHIEF JUSTICE, however, declining, on account of the intereſt of *Connecticut*, to take any part in the deciſion, and CHASE, and IREDELL, *Juſtices*, being abſent on account of indiſpoſition.

WASHINGTON, *Juſtice*. The firſt queſtion that occurs, from the arguments on the preſent occaſion, reſpects the nature of the rights, that are conteſted in the ſuits, depending in the Circuit Court. Without entering into a critical examination of the Conſtitution and laws, in relation to the juriſdiction of the Supreme Court, I lay down the following as a ſafe rule: That a caſe which belongs to the juriſdiction of the Supreme Court, on account of the intereſt that a ſtate has in the controverſy, muſt be a caſe, in which a State is either nominally, or ſubſtantially, the party. It is not ſufficient, that a State may be conſequentially affected; for, in ſuch caſe (as where the grants of different States are brought into litigation) the Circuit Court has clearly a juriſdiction. And this remark furniſhes an anſwer to the ſuggeſtions, that have been founded on the remote intereſt of the State, in making retribution to her grantees, upon the event of an eviction.

It is not contended that the States are nominally the parties; nor do I think that they can be regarded as ſubſtantially, the parties, to the ſuits: nay, it appears to me, that they are not even intereſted, or affected. They have a right either to the ſoil, or to the juriſdiction. If they have the right of ſoil, they may conteſt it, at any time, in this Court, notwithſtanding a deciſion in the preſent ſuits; and though they may have parted with the right of ſoil, ſtill the right of juriſdiction is unimpaired. A deciſion, as to the former object, between individual Citizens, can never affect the right of the State, as to the latter object: it is *res inter alios acta*. For, ſuppoſe the Jury in ſome caſes ſhould find in favor of the title under *New-York*; and, in others, they ſhould find in favor of the title under *Connecticut*, how would this decide the right of juriſdiction? And on what principle can private citizens, in the litigation of their private claims, be competent to inveſtigate, determine, and fix, the important rights of ſovereignty?

The

The queſtion of juriſdiction remaining, therefore, unaffected by the proceedings in theſe ſuits, is there no other mode by which it may be tried? I will not ſay, that a State could ſue at law for ſuch an incorporeal right, as that of ſovereignty and juriſdiction; but even if a Court of law would not afford a remedy, I can ſee no reaſon why a remedy ſhould not be obtained in a Court of Equity. The State of *New-York* might, I think, file a bill againſt the State of *Connecticut*, praying to be quieted as to the boundaries of the diſputed territory; and this Court, in order to effectuate juſtice, might appoint commiſſioners to aſcertain and report thoſe boundaries. There being no redreſs at law, would be a ſufficient reaſon for the interpoſition of the equitable powers of the Court; ſince, it is monſtrous to talk of exiſting rights, without applying correſpondent remedies. 1799.

But as it is propoſed to remove the ſuits under conſideration from the Circuit Court into this Court, by writs of *certiorari*, I aſk whether it has ever happened, in the courſe of judicial proceedings, that a *certiorari* has iſſued from a ſuperior, to an inferior, court, to remove a cauſe merely from a defect of juriſdiction? I do not know that ſuch a caſe could ever occur. If the State is really a party to the ſuit in the inferior Court, a plea to the juriſdiction may be there put in; or, perhaps, without ſuch a plea, this Court would reverſe the judgment on a writ of error: And if the State is not a party, there is no pretence for the removal.

A *certiorari*, however, can only iſſue, as original proceſs, to remove a cauſe, and change the *venue*, when the Superior Court is ſatisfied, that a fair and impartial trial will not otherwiſe be obtained; and it is ſometimes uſed, as auxiliary proceſs, where, for inſtance, diminution of the record is alledged, on a writ of error: But in ſuch caſes, the Superior Court muſt have juriſdiction of the controverſy. And as it does not appear to me, that this Court has excluſive, or original, juriſdiction of the ſuits in queſtion, I am of opinion that the rule muſt be diſcharged.

PATERSON, *Juſtice*. The rule to ſhew cauſe, why a *venire* ſhould not be awarded to ſummon a jury from ſome diſtrict, other than that of *Connecticut* or *New-York*, cannot be ſupported. It has, indeed, been abandoned. The argument proceeds on the ground of removing the cauſe into this Court, as having excluſive juriſdiction of it, becauſe it is a controverſy between States. The conſtitution of the *United States*, and the act of Congreſs, although the phraſeology be ſomewhat different, may be conſtrued in perfect conformity with each other. The preſent is a controverſy between individuals reſpecting their right or title to a particular tract of land, and cannot

1799. cannot be extended to third parties or ſtates. Its deciſion will not affect the State of *Connecticut* or *New-York*; becauſe neither of them is before the court, nor is it poſſible to bring either of them, as a party, before the Court, in the preſent action. The ſtate, as ſuch, is not before us. Beſides, if the cauſe ſhould be removed into this Court, it would anſwer no purpoſe; for I am not able to diſcern by what authority, we could change the *venue*, or direct a jury to be drawn from another Diſtrict. As to this particular there is no divolution of power either by the conſtitution or law. The authority muſt be given;—we cannot uſurp or take it.

If the point of juriſdiction be raiſed by the pleadings, the Circuit Court is competent to its deciſion; and, therefore, the cauſe cannot be removed into this Court previouſly to ſuch deciſion. To remove a cauſe from one Court to another, on the allegation of the want of juriſdiction, is a novelty in judicial proceedings. Would not the *certiorari* to remove, be an admiſſion of the juriſdiction below?

Neither of the motions is within the letter or ſpirit of the conſtitution or law.

How far a ſuit may, with effect, be inſtituted in this Court to decide the right of juriſdiction between two States, abſtractedly from the right of ſoil, it is not neceſſary to determine. The queſtion is a great one; but not before us.

I regret the incompetency of this Court to give the aid prayed for. No prejudice or paſſion, whether of a ſtate or perſonal nature, ſhould inſinuate itſelf in the adminiſtration of juſtice. Jurymen, eſpecially, ſhould be above all prejudice, all paſſion, and all intereſt in the matter to be determined. But it is the duty of judges to declare, and not to make the law.

CUSHING, *Juſtice*. Theſe motions are to be determined, rather by the conſtitution and the laws made under it, than by any remote analogies drawn from Engliſh practice.

Both by the conſtitution and the judicial act, the Supreme Court has original juriſdiction, where a State is a party. In this caſe, the State does not appear to be a party, by any thing on the record. It is a controverſy or ſuit between private citizens only; an action of ejectment, in which the defendant pleads to the juriſdiction, that the land lies in the State of *New-York*, and iſſue is taken on that fact.

Whether the land lies in *New-York* or *Connecticut*, does not appear to affect the right or title to the land in queſtion. The right of juriſdiction and the right of ſoil may depend on very different words, charters, and foundations. A deciſion of that iſſue, can only determine the controverſy as between the private citizens, who are parties to the ſuit, and the event, only give

give the land to the Plaintiff or Defendant; but could have no controuling influence over the line of juriſdiction; with reſpect to which, if either State has a conteſt with the other, or with individuals, the State has its remedy, I ſuppoſe, under the conſtitution and the laws, by proper application, but not in this way; for ſhe is not a party to the ſuits. 1799.

If an individual will put the event of his cauſe in a plea of this kind, on a fact, which is not eſſential to his right; I cannot think, it can prejudice the right of juriſdiction appertaining to a State.

I agree with the reſt of the Court, that neither of the motions can be granted.

BY THE COURT: Let the rule be diſcharged.

CLARKE *verſus* RUSSEL.

IN Error from the Circuit Court, for the Diſtrict of *Rhode-Iſland.* On the return of the Record, it appeared that a declaration, containing the following Count, had been filed in an action brought by "*Nathaniel Ruſſel* of *Charleſton*, in the Diſtrict of *South-Carolina*, merchant and citizen of the State of *South-Carolina*, againſt *John Innes Clarke* of *Providence*, in the County of *Providence* and Diſtrict of *Rhode-Iſland*, merchant and citizen of the State of *Rhode-Iſland*, and ſurviving partner of the company of *Joſeph Nightingale*, now deceaſed, and the ſaid *John Innes Clarke*, heretofore doing buſineſs under the firm of *Clarke* and *Nightingale*."

1ſt *Count.* "That the ſaid *John Innes Clarke* and *Joſeph* "*Nightingale*, then in full life, on the 10th day of March 1796, "at the Diſtrict of *Rhode-Iſland*, in conſideration that the "Plaintiff would at the ſpecial inſtance and requeſt of the "ſaid *Joſeph* and *John Innes*, indorſe ſeven ſeveral ſetts of "bills of Exchange, of the date, tenor, and deſcription as ſet "forth in the annexed ſchedule, drawn by a certain *Jonathan* "*Ruſſel*, who was agent and partner in that particular of "the company of *Robert Murray* and company, of *New-*"*York*, in the Diſtrict of *New-York*, on themſelves aſſumed, "and to the Plaintiff faithfully promiſed, that if the ſaid bills "ſhould not be paid by the perſon on whom the ſame were "drawn, and the Plaintiff, in conſequence of ſuch endorſe-"ment ſhould be obliged to pay the ſame bills, with damages, "coſts, and intereſt thereon, they the ſaid *Joſeph* and *John* "*Innes* would well and truly pay to the Plaintiff the amount "of the ſaid bills, damages, and coſts, and intereſt, if the Draw-

er